**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DONALD ROETS** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,024,365 |
| **MOLDED FIBER GLASS** | ) | |
| **CONSTRUCTION PRODUCTS** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **PENNSYLVANIA MANUFACTURERS** | ) | |
| **ASSOCIATION** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier appealed the December 3, 2008, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on May 20, 2009.

### APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, the parties stipulated claimant's pre-injury average weekly wage, *excluding insurance benefits*, was $444.13.

### ISSUES

This is a claim for a January 6, 2005, accident. In the December 3, 2008, Award, Judge Klein determined, among other things: (1) claimant's average weekly wage was $461.19; (2) for the period from August 1, 2006, through December 8, 2006, claimant was entitled to receive temporary total disability benefits; (3) claimant sustained a 15 percent whole person functional impairment for his low back injury as opined by Dr. Russell J.

Green; and (4) claimant had a 52.7 percent permanent partial disability when averaging a 13.2 percent task loss and a 79 percent wage loss. In determining claimant's functional impairment and task loss, the Judge excluded Dr. Prostic's opinions in light of the recent *Deguillen*[1] decision and claimant's use of unauthorized medical benefits.

Respondent contends: (1) claimant is not entitled to temporary total disability benefits from August 1, 2006, through December 8, 2006, as he was not restricted from working; (2) claimant's whole person functional impairment is 15 percent as opined by Dr. Green; (3) under the *Deguillen* decision and K.S.A. 44-510h(b)(2), Dr. Prostic's rating and task loss opinions should be excluded from the record because of an improper use of unauthorized medical benefits; (4) claimant has failed to prove he is permanently and totally disabled; and (5) claimant's permanent partial disability is 16.5 percent when averaging a 20 percent wage loss (using an imputed post-injury wage of $354.56 due to a lack of a good faith effort to become reemployed) and a 13 percent task loss (as opined by Dr. Green). In short, respondent requests the Board to reduce claimant's permanent partial disability to 16.5 percent.

Claimant contends: (1) the Judge's finding of a $461.19 average weekly wage should be upheld because respondent failed to provide the value of claimant's fringe benefits and, therefore, their value should be imputed; (2) based upon claimant's uncontroverted testimony, the Judge correctly determined temporary total disability benefits were due from August 1, 2006, through December 8, 2006; (3) Dr. Prostic's opinions are admissible as the facts in *Deguillen* are distinguishable; (4) claimant is permanently and totally disabled; (5) claimant's whole person functional impairment is 25 percent as opined by Dr. Prostic; and (6) if the Board finds claimant is not permanently and totally disabled, claimant's permanent partial disability is 61.5 percent when averaging a 44 percent task loss (as opined by Dr. Prostic) and a 79 percent actual wage loss. Accordingly, claimant requests the Board to either grant him permanent total disability benefits or increase his permanent partial disability to 61.5 percent.

The issues before the Board on this appeal are:

1. What is claimant's average weekly wage?

2. Is claimant entitled to receive temporary total disability benefits for the period from August 1, 2006, through December 8, 2006?

3. Should Dr. Prostic's opinions regarding functional impairment and task loss be excluded?

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[1] *Deguillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), *rev. denied* 286 Kan. ___ (2008).

4. What is the nature and extent of claimant's injuries and disability?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

### The accident and medical treatment

Respondent, which is located in Independence, Kansas, builds fiberglass molds used for making various products. The record is not clear whether claimant's job with respondent entailed repairing those molds or the products formed with the molds. In any event, on or about January 6, 2005,[2] claimant fell at work while hanging on a pipe and landed on his back. Claimant estimates that his feet were four or five feet above the floor when he fell. He described the accident as follows:

> Tommy Crow came and got me and had me to turn a main. I got on the pipe. The pipe slid, I fell. The pipe hit me in the chest. I landed on my back, cracked two ribs.[3]

There is no dispute that claimant's accident arose out of and in the course of his employment with respondent.

Respondent referred claimant to Dr. Bradley Barrett for medical treatment. Despite his injuries, claimant continued working for respondent until sometime in either March or May 2005, when his doctor restricted him from working. Dr. Barrett eventually referred claimant to Dr. Brad Meister, an orthopedic surgeon, who injected claimant's back. An MRI showed claimant had a right-sided L4-5 disc herniation. Claimant was then referred to Dr. Camden Whitaker, who on May 12, 2006, fused claimant's lower back at L4-5.

Dr. Whitaker released claimant from his care on February 20, 2007.

### Average weekly wage

Claimant worked full time for respondent, which paid him $9.75 per hour for a base wage of $390 per week ($9.75 x 40 hours). Most weeks claimant also received $20 as an "on time" bonus. Claimant's testimony is uncontroverted that he also worked three to four

[2] P.H. Trans. (Nov. 1, 2006) at 25, 26.

[3] R.H. Trans. at 16.

hours per week in overtime, which was paid at his regular hourly rate.[4] Finally, respondent also provided claimant some insurance benefits.[5] But there is no evidence in the record as to the value or cost of those benefits.

As indicated above, the parties agreed that claimant's average weekly wage, excluding insurance benefits, was $444.13. Because there is no evidence in the record as to the cost or value of claimant's insurance benefits, the Board finds claimant's average weekly wage for purposes of determining his workers compensation benefits is $444.13. Accordingly, the Award should be modified to correct the pre-injury average weekly wage and compensation rate.

**Temporary total disability benefits**

As indicated above, claimant worked through sometime in either March or May 2005, and underwent back surgery on May 12, 2006. Although claimant was not working, respondent kept paying claimant his regular wages.[6] And those payments continued through July 2006. Claimant also requests temporary total disability benefits from August 1 through December 8, 2006.

Claimant testified both Dr. Barrett and Dr. Whitaker restricted him from working. Dr. Whitaker did not testify, but the record indicates the doctor released claimant from treatment on February 20, 2007.

Claimant saw Dr. Edward J. Prostic in October 2006 (this examination was conducted as claimant desired an expert medical opinion regarding his need for additional medical treatment for purposes of the November 2006 preliminary hearing). At the time of the October 2006 examination, claimant did not believe he had recovered sufficiently from his May 2006 low back surgery to return to work. Indeed, the doctor noted claimant reported soreness when he awakened in the morning and that his symptoms worsened with sitting, standing, walking, bending, squatting, twisting, lifting, pushing, pulling, coughing, and sneezing. Claimant was taking Hydrocodone at that time and Dr. Prostic concluded claimant's fusion had not yet solidified.

[4] *Id.* at 15.

[5] P.H. Trans. (Nov. 1, 2006) at 26.

[6] R.H. Trans. at 48.

What is more, the doctor concluded from the October 2006 examination that claimant should be restricted to light/medium work.[7]

At the November 1, 2006, preliminary hearing, when he was still under Dr. Whitaker's care, claimant testified Dr. Whitaker had him under restrictions prohibiting bending, lifting, twisting, and turning. Moreover, claimant testified respondent was aware of his restrictions but the company did not return him to work but, instead, had him stay off work and paid his wages.[8]

The Board affirms the Judge's finding that claimant should receive temporary total disability benefits for the period from August 1, 2006, through December 8, 2006. As noted above, claimant's fusion had not solidified, his activities were significantly restricted by Dr. Whitaker, he was taking strong pain medication, and respondent had not provided him accommodated work.

**Dr. Prostic's opinions**

Dr. Prostic examined claimant on two occasions. As indicated above, the first examination, which was in October 2006, was conducted as claimant desired an expert medical opinion for purposes of the November 2006 preliminary hearing. Claimant had requested that hearing to seek an order authorizing continued treatment by Dr. Whitaker, the payment of medical bills, temporary total disability compensation, and reimbursement for medical mileage. Dr. Prostic indicated the purpose of the October 2006 examination was to determine whether claimant needed additional medical treatment.

At the November 2006 preliminary hearing, respondent agreed to pay Dr. Prostic's charges for the October 2006 examination as unauthorized medical expense to the extent claimant had not reached the $500 maximum allowed by the Workers Compensation Act for such expense. Dr. Prostic's office records indicate respondent paid $500 and claimant's attorney paid $154 for the October 2006 examination.

Dr. Prostic examined claimant a second (and final) time in early May 2007. As a result of that examination, the doctor concluded claimant had a successful fusion. Dr. Prostic also concluded claimant had rotator cuff tendinitis in the right shoulder. What is more, the doctor rated claimant's functional impairment under the AMA *Guides*.[9]

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[7] Prostic Depo. at 14.

[8] P.H. Trans. (Nov. 1, 2006) at 16.

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Respondent initially objected to the doctor's opinion that claimant had a 10 percent impairment to the right upper extremity and a 20 percent whole person impairment due to the lumbar spine, which combined for a 25 percent whole person impairment. But the doctor was later asked if claimant's 10 percent functional impairment to the right upper extremity and 20 percent functional impairment to the lumbar spine combined for a 25 percent functional impairment to the whole person and the doctor answered in the affirmative. There was no objection to that question.[10]

Based upon the second examination, Dr. Prostic recommended that claimant should do minimal activities with his right hand above shoulder height. Moreover, the doctor testified that claimant may lift up to 50 pounds to waist height, up to 20 pounds to shoulder height occasionally but half that much frequently. Applying his recommended work restrictions to the list of former work tasks prepared by Karen Crist Terrill, the doctor testified claimant should no longer perform 12 of the 27 tasks, or 44 percent, that claimant performed in the 15 years before his accident. Respondent did not object at Dr. Prostic's deposition to this testimony regarding claimant's work restrictions or his task loss.

Dr. Prostic also provided his opinion regarding claimant's ability to work. Considering claimant's "work history, his educational background, his IQ and his achievement academically,"[11] Dr. Prostic opined that it would be most difficult for claimant to find substantial gainful employment due to his lack of reading comprehension and physical impairment.

When Dr. Prostic first examined claimant in October 2006, he was not asked to provide an impairment rating. The request for an impairment rating was not made until the May 2007 examination, for which claimant's attorney paid $390. No funds were expended by respondent for Dr. Prostic's May 2007 examination of claimant from which the doctor evaluated and determined claimant's permanent functional impairment and work restrictions.

The Workers Compensation Act prohibits unauthorized medical benefits being used to obtain a functional impairment rating. K.S.A. 2004 Supp. 44-510h(b)(2) provides:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional

[10] Prostic Depo. at 18.

[11] *Id.* at 23.

> impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Respondent argues it paid Dr. Prostic $500 as unauthorized medical benefits and, therefore, the above statute prohibits his opinions regarding task loss and functional impairment from being admitted into the record. In support of its position, respondent cites the *Deguillen*[12] decision in which the injured worker consulted with Dr. Pedro Murati initially for an examination and the doctor was later asked and provided a functional impairment rating based upon the earlier examination. The Kansas Court of Appeals in *Deguillen* stated that "if an impairment rating is sought based upon a prior examination for which the employee seeks reimbursement, the unauthorized medical allotment has been used for an improper purpose, in contravention of the statute."[13] The Kansas Court of Appeals held:

> We hold that in order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed. In order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating may be solicited from that physician either as a part of the initial engagement or thereafter. Although employees are not prohibited from seeking independent advice on work-related injuries and may seek reimbursement for up to $500, the clear intent of the legislature is to prohibit such funds being applied to an improper impairment rating.[14]

In short, the Kansas Court of Appeals in *Deguillen* found the injured worker was not entitled to receive $500 in unauthorized medical benefits for the examination provided by Dr. Murati.

The Board finds the facts in *Deguillen* are distinguishable. Here, Dr. Prostic performed a separate examination that the doctor used to determine claimant's functional impairment and claimant's counsel paid for that examination. In *Deguillen* there was only one examination. Accordingly, the Board finds neither *Deguillen* nor the plain language of K.S.A. 2004 Supp. 44-510h(b)(2) bars Dr. Prostic's opinions from the record. In addition, although the first attempts of introducing Dr. Prostic's expert opinions into evidence drew objections from respondent, the doctor's opinions were then stated without objection.

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[12] *Deguillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), *rev. denied* 286 Kan. ___ (2008).

[13] Id. at 755, 756.

[14] *Id.* at 756.

In short, Dr. Prostic's opinions are part of the record and, therefore, should be considered in determining claimant's impairment and disability.

**Nature and extent of injury and disability**

Claimant is 44 years old, has a ninth grade education, and lives in Altoona, Kansas. Despite two attempts, claimant has yet to pass the test for a GED. Claimant testified that when attending school he was placed in Special Education classes.

After being released by Dr. Whitaker in February 2007, claimant contacted respondent about returning to work. But respondent did not accept claimant back to work.

At the regular hearing claimant testified he continued to experience symptoms that he attributed to his accident at work. He maintains he has constant low back pain that goes into his right leg, and symptoms in a hip and his right shoulder.[15] He contends he has difficulty with prolonged sitting and standing and that his tolerance for those activities is only 30 to 40 minutes at a time. When he testified in November 2007, claimant was still taking Hydrocodone that was being prescribed by his family physician, Dr. Morris.

Despite those ongoing symptoms, claimant maintains that he looks for work every day by checking the Wilson County newspaper. He also contends he has checked for jobs with Job Services and that he has made nine job applications as of November 13, 2007. According to claimant he has contacted both the gas station and restaurant in Altoona, which are its only employers, and he has contacted the various employers in Fredonia and Neodesha, which are only about eight miles from his hometown.

At this juncture, claimant has been unable to find other work. Consequently, he has taken odd jobs such as tree trimming; painting; assisting a friend shingle a roof by helping with the tear-off and cleanup, and carrying shingles up a ladder; and mowing. Claimant testified at his regular hearing that he has made approximately $100 per week from that work since being released by Dr. Whitaker. He also testified that he observes the work restrictions recommended by Dr. Whitaker, which he believed prohibited him from doing a lot of bending, twisting, and lifting more than 30 pounds.

Claimant's attorney hired vocational rehabilitation expert Karen Crist Terrill to meet with claimant and develop claimant's work history for purposes of this claim. Ms. Terrill met with claimant in late May 2007. At that time claimant had applied at six potential employers since being released by Dr. Whitaker three months earlier. In early August 2007, claimant met with respondent's vocational rehabilitation expert, Steve Benjamin. By August 2007,

[15] R.H. Trans. at 29, 30.

claimant had contacted only seven potential employers as in June 2007 he had stopped looking for work.[16] When claimant last testified in mid-November 2007, he had not recommenced his job search.

Despite his unsuccessful efforts to find other work, claimant has not applied for either unemployment benefits or Social Security disability benefits.

As indicated above, claimant's medical expert, Dr. Prostic, concluded claimant had a 10 percent impairment to his right upper extremity due to rotator cuff tendinitis and a 20 percent whole person impairment due to his low back, which combined for a 25 percent whole person impairment.

On the other hand, respondent's medical expert, board-certified occupational medicine physician Dr. Russell J. Green, examined claimant in January 2007 and, after referring claimant for a functional capacity evaluation, concluded claimant had a good result from his back surgery and could perform work in the medium labor category.[17] In other words, the doctor believed claimant could lift 20 to 50 pounds occasionally, lift 10 to 25 pounds frequently, and lift up to 10 pounds constantly. The doctor did not believe claimant needed any ongoing medical management.

Dr. Green, who is certified as a medical examiner by the American Board of Independent Medical Examiners, also used the AMA *Guides* in rating claimant's permanent impairment. The doctor determined claimant sustained a 15 percent whole person impairment due to his low back injury. Upon reviewing the list of former work tasks prepared by Mr. Benjamin, the doctor opined claimant had lost the ability to perform five of 38 tasks, or 13 percent. But considering claimant's comments about his job with respondent, the doctor indicated claimant could perform all of his former work tasks.[18] Moreover, claimant did not come across to the doctor as being mentally slow or inarticulate. In short, Dr. Green felt claimant was capable of substantial and gainful employment.

Ms. Terrill interviewed claimant and broke down claimant's work history into job tasks that were performed in the 15-year period before his accident. Ms. Terrill was not asked her opinion of whether claimant retained the ability to work.

Likewise, Mr. Benjamin broke down claimant's jobs into a list of work tasks that claimant performed over the 15-year period before his accident. Mr. Benjamin also

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[16] *Id.* at 41.

[17] Green Depo. at 16, 17.

[18] *Id.* at 29.

evaluated claimant's retained ability to earn wages and he concluded claimant should be able to earn an average of $354.56 per week. Considering the restrictions suggested by Drs. Green and Prostic, Mr. Benjamin felt claimant could perform work in the medium physical demand level and work, perhaps, as a truck driver, school bus driver, bench assembler, janitor, hand packager, groundskeeper, and vehicle or equipment cleaner.

Mr. Benjamin, however, acknowledged claimant does not have a commercial drivers license and, therefore, he could not obtain a truck driving job at the pay Mr. Benjamin envisioned.[19] In addition, Mr. Benjamin indicated that a commercial drivers license may be required to drive a school bus. Finally, Mr. Benjamin did not perform a labor market survey to even determine whether there were any available jobs in the county where claimant lived.

Mary Lynn Sylvester, a school psychologist with an undergraduate degree in education, a master's degree in secondary education, and education specialist degree in school psychology, administered achievement and intelligence tests to claimant. Suffice it to say, claimant scored low on those tests.

The Board is not persuaded that claimant is unable to perform substantial and gainful employment. The Board finds claimant retains the ability to perform work in the light labor category and at least some of the jobs included in the medium labor category. The Board is not persuaded that claimant's achievement and intelligence tests indicate he is unable to work. On the other hand, the Board is persuaded by Mr. Benjamin's opinion that claimant retains the ability to earn approximately $354.56 per week.

Only Drs. Green and Prostic provided opinions regarding claimant's functional impairment. The Board finds claimant has sustained a five percent impairment to his right upper extremity at the shoulder level and an 18 percent impairment to his whole person due to his low back injury, which combine for a 20 percent whole person functional impairment.

Claimant's permanent partial disability benefits are governed by K.S.A. 44-510e, which provides in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

[19] Benjamin Depo. at 26.

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[20] and *Copeland*.[21] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.[22]

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[23]

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[20] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[21] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[22] An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007); and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007). The Board, however, will continue to follow the *Foulk* and *Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate post-injury employment.

[23] *Copeland*, 24 Kan. App. 2d at 320.

The Kansas Court of Appeals in *Watson*[24] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[25]

Claimant has contacted a minimal number of potential employers. Although claimant worked for respondent in Independence, which is one of the larger towns in the area where claimant lives, he has not looked for work in that town. In short, the Board finds claimant has failed to prove he has made a good faith effort to find other employment since being released from medical treatment by Dr. Whitaker in February 2007. Consequently, for purposes of the wage loss prong of the permanent partial disability formula the Board finds claimant retains the ability to earn $354.56 per week. Comparing $354.56 to claimant's pre-injury wage of $444.13, the Board finds claimant has sustained a 20 percent wage loss.

Upon review of detailed task lists, Drs. Green and Prostic indicated claimant lost the ability to perform 13 percent and 44 percent of his former work tasks, respectively. The Board averages those task loss percentages and finds that claimant's task loss is approximately 29 percent. Averaging the 20 percent wage loss with the 29 percent task loss yields a 25 percent permanent partial disability. Accordingly, the Award should be modified in that respect.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[26] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE,** the Board modifies the December 3, 2008, Award, as follows:

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[24] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[25] *Id.* at Syl. ¶ 4.

[26] K.S.A. 2008 Supp. 44-555c(k).

Donald Roets is granted compensation from the Molded Fiber Glass Construction Products and its insurance carrier for a January 6, 2005, accident and resulting disability. Based upon an average weekly wage of $444.13, Mr. Roets is entitled to receive 26.43 weeks of temporary total disability benefits at $296.10 per week, or $7,825.92, plus 100.89 weeks of permanent partial disability benefits at $296.10 per week, or $29,873.53, for a 25 percent permanent partial disability, making a total award of $37,699.45, which is all due and owing less any amounts previously paid.

The provision in the Award approving the fee arrangement is set aside. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Division for review and approval. Accordingly, under K.S.A. 44-536(b), claimant may be entitled to such fee as approved.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this ____ day of June, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge